

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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In the Matter of:)	
)	
Jon Kemp)	Matter No. J-0098-09
Employee)	
)	Date of Issuance:
v.)	August 6, 2009
)	
Department of Housing & Community Development)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.
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Director Leila Edmonds, Agency Representative
Jon Kemp, Employee pro se

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 11, 2009, Employee, an Information Technology Specialist, filed a petition for appeal from Agency's action abolishing his position effective January 30, 2009, due to a Reduction-in-Force (RIF). This appeal was assigned to me on July 10, 2009.

Because there appeared to be a jurisdictional issue, I ordered Employee to submit a legal brief on the issue. Employee gave his response. Because this matter could be decided based on the documents of record, no additional proceedings were held. The record is closed.

JURISDICTION

Due to Employee's untimely filing, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter must be dismissed for lack of jurisdiction as a result of Employee's untimely filing.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following facts are not subject to genuine dispute:

1. On December 31, 2008, Employee, an Information Technology Specialist since 1989, received a thirty-day advance RIF notice from Agency.
2. The notice advised Employee that he could elect to file an appeal with the Office of Employee Appeals within thirty calendar days. This final decision advised Employee of his appeal rights to this Office and listed the Office's address and telephone number. Attached to the decision was a copy of the Office's Petition for Appeal Form.
3. It was not until March 11, 2009, more than a month after the effective date of his termination, and more than two months after he received his notice of the separation, that Employee filed the instant petition for appeal with the Office.

Prior to October 21, 1998, the Comprehensive Merit Personnel Act (CMPA), D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2001), did not contain a time limit for filing a petition for appeal in this Office. Rather, the Office's Rules and Regulations in effect at that time required a petition for appeal to be filed within 15 business days of the effective date of the action being appealed. *See* OEA Rule 608.2, 39 D.C. Reg. 7408 (1992). Because the filing requirement was not mandated by statute, the Office's Rules specifically permitted an Administrative Judge to waive the requirement for good cause shown. *See* OEA Rule 602.3, 39 D.C. Reg. at 7405.

However, effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the CMPA. Among these amendments was the addition of a statutory time limit for filing an appeal in this Office. The relevant section reads as follows: "Any appeal shall be filed within 30 days of the effective date of the appealed agency action." D.C. Official Code § 1-606.03(a) (2001). The Office's Rules and Regulations have been amended to reflect this change. *See* OEA Rules 604.1 and 604.2, 46 D.C. Reg. 9299 (1999).

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985). Following these cases, this Office's Board has held that the statutory 30-day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature. *See King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), __ D.C. Reg. ____ (). Further, in *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), __ D.C. Reg. ____ (), it was held that the only situation in which an agency may not "benefit from the [30-day] jurisdictional bar" is when the agency fails to give the

employee “adequate notice of its decision and the right to contest the decision through an appeal.” *McLeod*, slip op. at 8. (citations omitted).

OEA Rule 629.2, 46 D.C. Reg. at 9317, reads as follows: “The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.” According to OEA Rule 629.1, *id*, a party’s burden of proof is by a “preponderance of the evidence”, which is defined as “[t]hat degree of relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.”

Despite being informed that he had to establish jurisdiction over his appeal, Employee sidestepped the issue, and instead, wrote a diatribe on the unfairness of Agency’s action. He alleged racial and age discrimination.

It is clear that Employee failed to comply with the mandatory filing deadline. Employee did not deny that he received the notice of separation more than two months before he filed his appeal. The notice clearly stated his right to appeal his separation to this Office and underlined the fact that he had thirty calendar days to do so. Although given the chance to do so, Employee never explained his delay.

The 30-day filing deadline is mandatory, and to date this Office has recognized only one exception to that jurisdictional bar – when the agency fails to give the employee “adequate notice of its decision and the right to contest the decision through an appeal.” *McLeod, supra*. Here, Agency clearly gave Employee such notice in its final decision. Employee did not exercise due diligence in timely filing his petition for appeal and has failed to present an argument sufficient for me to broaden the scope of the exception to the mandatory filing deadline articulated in *McLeod*.

Therefore, I conclude that Employee has failed to meet his burden of establishing this Office’s jurisdiction over his appeal. Thus, I cannot address his other arguments and Employee’s petition for appeal is dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge